

Below is an Opinion of the Court.

  
RANDALL L. DUNN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case  
JOSHUA JAMES STEWART and OLGA V. ) No. 08-33275-rld7  
STEWART, ) MEMORANDUM OPINION  
Debtors. )

Emily Hawkins ("Hawkins"), an unsecured creditor,<sup>1</sup> moved to dismiss the debtors' (the "Stewarts") bankruptcy case under § 707(b)(2) and (b)(3)<sup>2</sup> on the grounds that the Stewarts' case is an abuse of the provisions of chapter 7.<sup>3</sup>

---

<sup>1</sup> The Stewarts scheduled Hawkins as a general unsecured creditor with a \$19,168 contingent claim, based on claim(s) arising from her short-sale purchase of the Stewarts' condominium unit.

<sup>2</sup> Unless otherwise indicated, all chapter, section and rule references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as enacted and promulgated as of October 17, 2005, the effective date of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 110 Stat. 23 ("BAPCPA").

<sup>3</sup> Hawkins actually filed an objection to the chapter 7 trustee's (continued...)

1           Having listened to testimony and argument from both parties and  
2 considered the record, including relevant documents from the docket and  
3 relevant legal authorities, I deny Hawkins's motion to dismiss under  
4 § 707(b)(2) and § 707(b)(3)(B) for the following reasons.

5  
6 Background

7           The Stewarts filed their chapter 7 bankruptcy petition on  
8 July 2, 2008. Consistent with § 521(a)(2)(A) and Rule 1007(b)(4)  
9 [Interim], the Stewarts filed a "Chapter 7 Statement of Current Monthly  
10 Income and Means-Test Calculation" ("Original Form B22A") and a  
11 "Statement of Intention(s) Per 11 U.S.C. § 521(a)" ("Statement of  
12 Intent").

13           The Stewarts indicated on the Original Form B22A that, based on  
14 their calculations, the presumption of abuse under § 707(b)(2) did not  
15 arise.<sup>4</sup> On the Original Form B22A, they listed current monthly income of

16 \_\_\_\_\_  
17           <sup>3</sup>(...continued)  
18 motion to settle and compromise a dispute with the Stewarts regarding  
19 their claimed exemptions and a prepetition payment to their parents. At  
20 the preliminary hearing on October 22, 2008, I decided to treat Hawkins's  
objection as a motion to dismiss the case under § 707(b) and to abate  
consideration of approval of the proposed settlement.

21           <sup>4</sup> BACPA amended § 707(b), which governs dismissal of chapter 7  
22 cases. Fokkena v. Hartwick, 373 B.R. 645, 648 (D. Minn. 2007). "One of  
23 the purposes of the amendment was to curb abuse by dismissing cases filed  
24 by Chapter 7 debtors who seek discharge of their debts even though they  
have the ability to repay their creditors and, thus, file under Chapter  
13, under which debtors usually repay some or all of their debts." Id.  
(citation omitted).

25           Section 707(b)(2) provides a complex mathematical formula, commonly  
26 known as the "means test," which "gauges a debtor's ability to repay his  
or her debts by measuring how much disposable income the debtor will have  
(continued...)

1 \$5,815, which resulted in an annualized current income of \$69,780.  
2 Although their annualized current monthly income exceeded the applicable  
3 median family income of \$53,236 for a household of two in Oregon,<sup>5</sup> their  
4 deductions resulted in a monthly disposable income of -\$4,653.42, or a  
5 60-month disposable income of -\$279,205.20, thereby demonstrating that  
6 they qualified for chapter 7 relief.

7 In calculating their monthly disposable income for § 707(b)(2)  
8 purposes, on line 42 of Part VI of the Original Form B22A, "Future  
9 payments on secured claims," the Stewarts listed as a deduction an  
10 \$8,666.67 monthly mortgage payment for their former residence located in  
11 Clackamas, Oregon. The Stewarts indicated on their Statement of Intent  
12 that they would surrender the residence. In fact, at the time the  
13 Stewarts' filed their bankruptcy petition, the Stewarts were living in  
14  
15

16 \_\_\_\_\_  
17 <sup>4</sup>(...continued)  
18 each month, after the deduction of allowable expenses." In re Lindstrom,  
19 381 B.R. 303, 304 (Bankr. D. Colo. 2007). If the debtor's monthly  
20 disposable income is greater than a particular statutorily set amount,  
21 indicating that he or she has the ability to repay his or her debts, the  
22 case is presumed to be an abuse of chapter 7. Fokkena, 373 B.R. at 649.  
23 The "Chapter 7 Statement of Current Monthly Income and Means-Test  
24 Calculation" provides the framework to apply this mathematical formula.

25 <sup>5</sup> Section 707(b)(7) provides a "safe harbor" for debtors whose  
26 annualized current monthly income (i.e., the debtor's current monthly  
income, as defined under § 101(10A), multiplied by 12) is equal to or  
less than the median family income for a family the size of the debtor's  
household in the applicable state. In that instance, the presumption of  
abuse does not arise, and the debtor is not required to complete the  
means test. Here, the Stewarts' annualized current monthly income  
exceeded the applicable median family income for a household of two in  
Oregon, requiring the Stewarts to complete the means test calculations.

1 the U.S. Virgin Islands.<sup>6</sup> The secured creditor later obtained relief  
2 from stay (which the Stewarts did not oppose), allowing it to foreclose  
3 on and obtain possession of the residence. Order Re: Notice and Motion  
4 for Relief from Stay at 2, docket no. 12.

5 The Stewarts represented on their petition that their debts  
6 were primarily consumer debts. They listed on their schedules \$522,000  
7 in secured debt and \$369,960 in general nonpriority unsecured debt.<sup>7</sup> The  
8 Stewarts' only secured debt was the mortgage on their former residence.  
9 The Stewarts' general unsecured debt consisted mainly of credit card debt  
10 and debt for building materials and contractor services. They listed an  
11 average monthly income of \$5,380 on their Schedule I and average monthly  
12 expenses of \$4,357 on their Schedule J.

13 Olga Stewart, who started her employment as a traveling  
14 registered nurse on July 14, 2008, reported a gross income of \$4,507 on  
15 Schedule I. The Stewarts included a car rental stipend of \$650 and a  
16 housing stipend of \$1,350 from Olga Stewart's employer in calculating  
17 their average monthly income on Schedule I. The Stewarts did not list  
18 the monthly mortgage payment on their Schedule J; in fact, they did not  
19 include rent or a mortgage payment as an expense. They noted, however,  
20 that they would have a monthly housing expense of approximately \$1,350

---

21  
22 <sup>6</sup> The Stewarts indicated on their Statement of Financial Affairs  
23 that they last occupied the residence in April 2008. They noted on their  
24 schedules that they were moving to the U.S. Virgin Islands as of the  
petition date and listed on their petition a street address in the U.S.  
Virgin Islands.

25 <sup>7</sup> This amount does not include the \$72,000 unsecured portion of the  
26 secured mortgage creditor's claim, as listed by the Stewarts on their  
Schedule D.

1 after five months. To date, the Stewarts have not amended their Schedule  
2 I and Schedule J.

3 Four days after the § 341(a) meeting on August 1, 2008, the  
4 United States Trustee filed a statement pursuant to § 704(b)(1),  
5 indicating that the case was not presumed to be an abuse under  
6 § 707(b)(2).

7 Hawkins soon thereafter filed what I have interpreted as a  
8 motion to dismiss under § 707(b) ("Motion to Dismiss"). She asserted  
9 that, as they intended to surrender the residence and no longer occupied  
10 it, the Stewarts inappropriately included the monthly mortgage payment in  
11 calculating their monthly disposable income. Hawkins contended that, by  
12 reducing their housing expense to the amount allowed under the Internal  
13 Revenue Service ("IRS") local standards ("Local Standards"), the Stewarts  
14 would have substantial monthly disposable income with which to fund a  
15 chapter 13 plan. She also argued that, given the totality of their  
16 actual financial circumstances, granting the Stewarts relief would be an  
17 abuse of chapter 7.<sup>8</sup>

18 The Stewarts filed an "Amended Chapter 7 Statement of Current  
19 Monthly Income and Means-Test Calculation" ("Amended Form B22A") several  
20 weeks before the January 12, 2009 final evidentiary hearing on the Motion  
21 to Dismiss. On the Amended Form B22A, the Stewarts' current monthly  
22 income remained the same, but their deductions were modified.  
23 Specifically, on line 25 of Part V, "Other Necessary Expenses: taxes,"  
24 the Stewarts listed an expense of \$663 for federal, state and local  
25

---

26 <sup>8</sup> Hawkins did not make this argument in the Motion to Dismiss, but  
at the final evidentiary hearing on January 12, 2008.

1 taxes.<sup>9</sup> The Stewarts also reduced the monthly mortgage payment from  
2 \$8,666.67 to \$3,589.<sup>10</sup> As a result of these modifications, the Stewarts'  
3 monthly disposable income calculated on the Amended Form B22A was  
4 -\$634.65, and their 60-month disposable income was -\$38,079.

5 Several hours after the final evidentiary hearing, the Stewarts  
6 filed a "Second Amended Chapter 7 Statement of Current Monthly Income and  
7 Means-Test Calculation" ("Second Amended Form B22A").<sup>11</sup> The Second  
8 Amended Form B22A reflected an increased current monthly income of  
9 \$6,294, which resulted in an annualized current income of \$75,528. The

---

10  
11 <sup>9</sup> The Stewarts adjusted their expenses in the Amended Form B22A to  
12 reflect a deduction for taxes "withheld from Olga's pay." Memorandum in  
13 Response to 707(b) Motion Filed by Creditor at 1, docket no. 32. The  
14 Stewarts explained that, at the time they filed their bankruptcy  
15 petition, Olga Stewart had obtained employment as a traveling nurse in  
16 the U.S. Virgin Islands. Memorandum in Response to § 707(b) Motion Filed  
17 by Creditor at 2, docket no. 32. Because they did not know how much of  
18 her income would be taxed, the Stewarts did not list a deduction for  
19 taxes in the Original Form B22A. Memorandum in Response to § 707(b)  
20 Motion Filed by Creditor at 2, docket no. 32. Upon determining her tax  
21 withholding, they modified their expenses in their Amended Form B22A.

22 <sup>10</sup> The Stewarts filed the Amended Form B22A to reflect their actual  
23 monthly mortgage payments. In the Original Form B22A, they included the  
24 entire mortgage balance averaged over 60 months, believing that the terms  
25 of the mortgage required a balloon payment in full or a refinance after  
26 completion of the construction of their residence. Memorandum in  
Response to 707(b) Motion Filed by Creditor at 1, docket no. 32. The  
Stewarts later discovered that the mortgage had a 30-year term, which  
called for interest-only payments of \$3,589 per month for the first five  
years of the term. Memorandum in Response to 707(b) Motion Filed by  
Creditor at 2, docket no. 32. They adjusted the mortgage payment in the  
Amended Form B22A accordingly.

24 <sup>11</sup> At the final evidentiary hearing, I advised the parties that I  
25 would not issue a ruling until the Stewarts filed another amended Chapter  
26 7 Statement of Current Monthly Income and Means-Test Calculation, as the  
Amended Form B22A inappropriately included postpetition rather than  
prepetition tax withholding as an expense.

1 Second Amended Form B22A also listed an increased deduction of \$1,558 for  
2 federal, state and local taxes. The monthly mortgage payment remained  
3 the same. The net result of the Second Amended Form B22A was to reduce  
4 the Stewarts' monthly disposable income to -\$1,050.65, and their 60-month  
5 disposable income to -\$63,039.

6 Upon the Stewarts' filing of the Second Amended Form B22A, I  
7 took the matter under submission. This Memorandum Opinion constitutes my  
8 findings of fact and conclusions of law, which I make under Fed. R. Civ.  
9 P. 52(a), applicable in this contested matter under Fed. R. Bankr. P.  
10 7052 and 9014. I have jurisdiction to resolve this matter under 28  
11 U.S.C. §§ 1334(b), 157(a), 157(b)(1), and 157(b)(2)(A) and (O).

12  
13 Discussion

14 Under § 707(b)(1), I may dismiss a case if I determine that the  
15 granting of relief would be an abuse of the provisions of chapter 7.<sup>12</sup>  
16 Section 707(b) sets forth two methods, embodied in § 707(b)(2) and  
17 (b)(3), by which I am to determine whether the case is an abuse of  
18 chapter 7. In re Haar, 360 B.R. 759, 760-61 (Bankr. N.D. Ohio 2007).

19 As noted above, § 707(b)(2) provides a mathematical formula -  
20 the means test - to determine whether a debtor has sufficient monthly  
21 disposable income with which to repay at least a significant portion of

22  
23 <sup>12</sup> Section 707(b)(1) provides, in relevant part: "After notice and a  
24 hearing, the court . . . on a motion by . . . any party in interest, may  
25 dismiss a case filed by an individual debtor under this chapter whose  
26 debts are primarily consumer debts, or, with the debtor's consent,  
convert such a case to a case under chapter 11 or 13 of this title if it  
finds that the granting of relief would be an abuse of the provisions of  
this chapter."

1 his or her debts.<sup>13</sup> Id. If the debtor has sufficient monthly disposable  
2 income to pay some or all of his or her debts, the case may be presumed  
3 to be an abuse of chapter 7, justifying dismissal or, if the debtor  
4 consents, conversion to chapter 11 or chapter 13. Id.

5 Even if no presumption of abuse arises under § 707(b)(2), or  
6 the debtor manages to rebut the presumption of abuse, I must consider  
7 under § 707(b)(3) whether the case is nonetheless an abuse of chapter 7  
8 because either the debtor filed the case in bad faith or the totality of  
9 the circumstances of the debtor's financial situation demonstrates abuse.  
10 In re Sorrell, 359 B.R. 167, 180 (Bankr. S.D. Ohio 2007).

11 The standards regarding dismissal under § 707(b)(2) and (b)(3)  
12

---

13  
14 <sup>13</sup> Section 707(b)(2)(A)(i) provides: "In considering under paragraph  
15 (1) whether the granting of relief would be an abuse of the provisions of  
16 this chapter, the court shall presume abuse exists if the debtor's  
current monthly income reduced by the amounts determined under clauses  
of - (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser

17 (I) 25 percent or the debtor's nonpriority unsecured claims in the  
18 case, or \$6,575, whichever is greater; or  
(II) \$10,950."

19 Put more simply:

20 If, after subtracting the allowable monthly expenses  
21 from the debtor's [current monthly income], the amount  
22 of monthly disposable income, multiplied by 60, is  
greater than \$10,950, then the debtor 'fails' the Means  
23 Test. If the amount is less than \$6,575, then the  
debtor 'passes' the Means Test. If the amount is  
24 between \$6,575 and \$10,950, the debtor only fails the  
Means Test if the amount is greater than 25% of the  
25 debtor's non-priority unsecured claims.

26 In re Ralston, 2009 WL 322946 at \*2 (Bankr. M.D. Fla. Feb. 10,  
2009).



1 are different. With respect to dismissal under § 707(b)(2), in this  
2 case, I must interpret § 707(b)(2)(A)(iii)(I). Specifically, are the  
3 Stewarts entitled to deduct secured debt payments from their current  
4 monthly income in calculating their disposable monthly income under the  
5 means test set forth in § 707(b)(2)(A)(i), notwithstanding their  
6 surrender of the collateral?

7 As to dismissal under § 707(b)(3)(B), I must decide whether the  
8 Stewarts financial situation demonstrates abuse in the totality of the  
9 circumstances.

10  
11 A. § 707(b)(2)

12 Hawkins contends that the Stewarts initially passed the means  
13 test only by including the mortgage payment for their surrendered  
14 residence in calculating their monthly disposable income. Although she  
15 acknowledges that the Stewarts are entitled to deduct housing expenses,  
16 Hawkins argues that deducting the monthly mortgage payment is  
17 inappropriate, as it is not reasonable and necessary under § 707(b)(2).

18 Hawkins asserts that the monthly mortgage payment is  
19 unreasonable because the Stewarts lack the means to make the mortgage  
20 payment. She contends that the mortgage payment is unnecessary because  
21 the Stewarts no longer occupy the residence, having moved to the U.S.  
22 Virgin Islands.

23 Hawkins argues that Olga Stewart has an annual income of  
24 approximately \$70,000, or a monthly income of approximately \$5,800.  
25 According to Hawkins, the allowance for housing expenses and utilities  
26 under the Local Standards for Multnomah County is \$1,500 per month.

1 Deducting \$1,000 for food and "personal goods" and \$1,800 for housing and  
2 utilities, Hawkins estimates that the Stewarts have monthly disposable  
3 income of approximately \$3,000.<sup>14</sup> Multiplying this number by 60, Hawkins  
4 concludes that the Stewarts have a 60-month disposable income of  
5 \$180,000. Based on this calculation, Hawkins claims, the Stewarts fail  
6 the means test, thereby making them ineligible for chapter 7 relief.

7 The issue before me regarding the Motion to Dismiss under  
8 § 707(b)(2) centers on the interpretation of § 707(b)(2)(A)(iii)(I).  
9 Section 707(b)(2)(A)(iii)(I) provides, in relevant part:

10 (iii) The debtor's average monthly payments on account  
11 of secured debts shall be calculated as the sum of -  
12 (I) the total of all amounts scheduled as  
13 contractually due to secured creditors in  
14 each month of the 60 months following the  
15 date of the petition . . . .

16 Hawkins cites to § 707(b)(2)(A)(ii)(V) as the basis for  
17 excluding the monthly mortgage payment in the Stewarts' means test  
18 calculations. Her reliance on this provision is misplaced in this  
19 context.<sup>15</sup>

20 Section 707(b)(2)(A)(ii)(V) allows a debtor to deduct expenses

---

21 <sup>14</sup> Hawkins stated that "the allowance for housing and utilities  
22 should be the \$1,500 that [the Stewarts] are actually paying for housing,  
23 plus a reasonable allowance for their actual utility costs." Objection  
24 Filed by Creditor. . . Re: Motion to Settle and Compromise, docket no.  
25 23. I infer from this statement that Hawkins estimated \$300 in utility  
26 expenses, for a total allowance of \$1,800 for both housing and utilities,  
which resulted in the \$3,000 monthly disposable income she calculated.

<sup>15</sup> I note, however, that Hawkins's argument as to whether the  
monthly mortgage payment is a reasonable and necessary expense may be  
relevant to determining the Motion to Dismiss under § 707(b)(3) in the  
totality of the circumstances, which I address below.

1 for utilities and other non-mortgage housing expenses in excess of the  
2 Local Standards, based on his or her actual expenses for home energy  
3 costs.<sup>16</sup> See In re Simmons, 357 B.R. 480, 486 (Bankr. N.D. Ohio  
4 2006)("The reporting requirements for § 707(b)(2)(A)(ii)(V) are captured  
5 on line 37 of the Means Test Form."). Section 707(b)(2)(A)(ii)(V)  
6 therefore does not apply to my determination as to whether the Stewarts  
7 may include the monthly mortgage payment in their calculation of their  
8 monthly disposable income under the means test.

9 Hawkins also argues that the monthly mortgage payment exceeds  
10 the amount allowed under the Local Standards. The Stewarts, she asserts,  
11 only should be permitted to deduct the amount set under the Local  
12 Standards. I note that the Stewarts took no deduction for mortgage  
13 expenses under the Local Standards.<sup>17</sup> The Stewarts use the monthly  
14 mortgage payment as a deduction under § 707(b)(2)(A)(iii)(I) in  
15

---

16 <sup>16</sup> Section 707(b)(2)(A)(ii)(V) provides:

17 In addition [to the expenses set forth under  
18 § 707(b)(2)(A)(ii)(I)], the debtor's monthly expenses  
19 may include an allowance for housing and utilities, in  
20 excess of the allowance specified by the Local  
21 Standards for housing and utilities issued by the  
22 Internal Revenue Service, based on the actual expenses  
23 for home energy costs if the debtor provides  
documentation of such actual expenses and demonstrates  
that such actual expenses are reasonable and necessary.  
(emphasis added)

24 <sup>17</sup> The Local Standard for mortgage/rent expense is \$1,187. The  
25 Stewarts' monthly mortgage expense of \$8,666.67 on their Original Form  
26 B22A, and \$3,589 on their Amended Form B22A and Second Amended Form B22A  
exceed this amount. Based on the formula set forth under line 20B,  
"Local Standards: housing and utilities; mortgage/rent expense," the  
Stewarts have a deduction of \$0.

1 calculating their monthly disposable income under the means test. The  
2 question is whether the Stewarts may use this deduction, even though they  
3 surrendered the residence.

4  
5 1. Split in authority in interpreting § 707(b)(2)(A)(iii)(I)  
6 Interpreting a statute begins with its language, Hughes Aircraft  
7 Co. v. Jacobson, 525 U.S. 432, 438 (1999), keeping in mind that Congress  
8 “says in a statute what it means and means in a statute what it says  
9 there.” Hartford Underwriters Ins. Co. v. Union Planters Bank, NA, 530  
10 U.S. 1, 6 (2000)(quoting Connecticut Nat’l Bank v. Germain, 503 U.S. 249,  
11 254 (1992)). The court must enforce a statute’s language according to  
12 its terms, unless such a reading would render it absurd. Lamie v. United  
13 States Trustee, 540 U.S. 526, 534 (2004)(“It is well established that  
14 ‘when the statute’s language is plain, the sole function of the courts -  
15 at least where the disposition required by the text is not absurd - is to  
16 enforce it according to its terms.’”)(quoting Hartford, 530 U.S. at 6).  
17 In the absence of a statutory definition, the court construes a statutory  
18 term according to its ordinary, contemporary, and common meaning. San  
19 Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th  
20 Cir. 2004).

21 A split in authority has developed among courts interpreting  
22 § 707(b)(2)(A)(iii)(I). See, e.g., In re Makres, 380 B.R. 30, 33-34  
23 (Bankr. N.D. Okla. 2007); Lindstrom, 381 B.R. at 305; In re Smale, 390  
24 B.R. 111, 115 (Bankr. D. Del. 2008). The majority of courts have  
25 concluded that, in calculating their monthly disposable income under the  
26 means test, debtors may deduct debt payments under § 707(b)(2)(A)(iii)(I)

1 on property that has been or will be surrendered. Makres, 380 B.R. at 33  
2 n.9 (collecting cases).

3 Although most courts on either side of the split agree that  
4 interpretation of § 707(b)(2)(A)(iii)(I) is governed by the plain  
5 language of the statute, their interpretations differ. See id. at 33.  
6 See also In re Hayes, 376 B.R. 55, 61 (Bankr. D. Mass. 2007); In re  
7 Gaylon, 366 B.R. 164, 168 (Bankr. W.D. Okla. 2007). In interpreting  
8 § 707(b)(2)(A)(iii)(I), courts focus on the phrase, "scheduled as  
9 contractually due." Makres, 380 B.R. at 33. See also Lindstrom, 381  
10 B.R. at 305. Both the majority and the minority parse the phrase into  
11 two components: "scheduled" and "as contractually due."

12 Under the minority view, "[a debtor's] schedules and statements  
13 [together] form the basis from which the Court should determine whether a  
14 debt is 'scheduled as contractually due.'" In re Skaggs, 349 B.R. 594,  
15 599 (Bankr. E.D. Mo. 2006). Cf. In re Ray, 362 B.R. 680, 684-85 (Bankr.  
16 D.S.C. 2007)(determining that meaning of "schedule" and "scheduled"  
17 elsewhere in Bankruptcy Code is of little use and relying on debtor's  
18 statement of intention because phrase, "scheduled as contractually due,"  
19 is forward-looking calculation that considers debtor's intention to  
20 surrender collateral and to make no future debt payments, which does not  
21 support deduction of debt payments under § 707(b)(2)(A)(iii)(I)).

22 Focusing on the phrase, "contractually due," without considering  
23 the import of the term "scheduled" and the phrase "in each of the 60  
24 months following the date of the petition" "miss[es] the actual meaning  
25 and intent of § 707(b)(2)," the primary purpose of which was to ensure  
26 that those debtors who can repay their debts do so. Skaggs, 349 B.R. at

1 600. When a debtor surrenders property secured by debt, he or she is no  
2 longer making the scheduled debt payments. Allowing debtors to take a  
3 deduction under § 707(b)(2)(A)(iii)(I) when they are not actually making  
4 debt payments thus defeats the purpose of the means test. See In re  
5 Harris, 353 B.R. 304, 309-10 (Bankr. E.D. Okla. 2006). Under the  
6 minority view, then, a debtor cannot include a deduction for monthly  
7 payments for secured debt in calculating his or her monthly disposable  
8 income under the means test, when he or she surrenders the collateral.

9 Under the majority view, epitomized by In re Walker, 2006 WL  
10 1314125 (Bankr. N.D. Ga. May 1, 2006), "scheduled" and "as contractually  
11 due" are construed in their ordinary senses. Id. at \*3. See also, e.g.,  
12 Fokkena, 373 B.R. at 654; Ralston, 2009 WL 322946 at \*6; In re Benedetti,  
13 372 B.R. 90, 95 (Bankr. S.D. Fla. 2007); and In re Kelvie, 372 B.R. 56,  
14 61-62 (Bankr. D. Idaho 2007).

15 "Scheduled" means "'to plan for a certain date,'" while "as  
16 contractually due," means that "the debtor is legally obligated under the  
17 contract . . . to make a payment in a certain amount . . . for a set  
18 number of months into the future." Walker, 2006 WL 1314125 at \*3  
19 (citation omitted). Putting these two components together, "payments  
20 that are 'scheduled as contractually due' are those payments that the  
21 debtor will be required to make on certain dates in the future under the  
22 contract," whether or not the debtor actually makes those future  
23 payments. Id.

24 A debtor's surrender of the collateral does not affect his or  
25 her ability to take the deduction under the means test, which provides an  
26 historical "snapshot" of the debtor's financial circumstances averaged

1 over a period of six months prepetition. As Walker reasons:

2 The use of the phrase "contractually due" also  
3 indicates an intent to permit a deduction for all  
4 secured debts, regardless of whether . . . the  
5 collateral is surrendered. The surrender of the  
6 collateral does not change the fact that the payments  
7 are "contractually due." When a debtor files the  
8 bankruptcy petition, the debtor is contractually due  
9 for payments on the outstanding secured debts for the  
10 length of the contract. The debtor's contractual  
11 liability for the debt is not eliminated upon the  
12 surrender of the collateral. At the earliest, it may  
13 be eliminated by the entry of the discharge. At the  
14 latest, the contractual obligation may never actually  
15 be eliminated, but instead, the creditor would merely  
16 be enjoined from collecting the debt from the debtor in personam. In other words, nothing the debtor does or  
does not do changes the fact that scheduled payments  
remain contractually due.

11 . . .

13 Even if the debtor does surrender the collateral, the  
14 surrender of the collateral does not change the fact  
15 that the payments are "scheduled as contractually due  
16 to a secured creditor." Following the surrender of the  
collateral, the creditor remains a secured creditor at  
least until the collateral has been liquidated and the  
proceeds are applied to satisfy the debt.

17 Id. at \*4 (citations omitted). See also Haar, 360 B.R. at 764; Sorrell,  
18 359 B.R. at 186; and Simmons, 357 B.R. at 484-85. Thus, under the  
19 majority view, debtors may deduct secured debt payments contractually due  
20 as of the petition date in their means test calculations, notwithstanding  
21 their surrender of the collateral.

23 2. Section 707(b)(2)(A)(iii)(I), interpreted according to its  
24 terms, allows the Stewarts to deduct debt payments on  
their surrendered residence

25 Based on my review of both the majority and minority decisions,  
26 I conclude that the majority view provides a better reasoned analysis

1 that comports with the plain meaning approach to statutory construction.

2         The minority's interpretation of § 707(b)(2)(A)(iii)(I) does  
3 not accord with the plain meaning approach. As the court in In re Randle  
4 pointed out, the plain language of the statute "does not say that the  
5 debtor can deduct this amount only if she intends to keep the collateral  
6 post-petition. It does not say that the debtor can deduct this amount  
7 only if she intends to continue making the payments due post-petition."  
8 358 B.R. 360, 363 (Bankr. N.D. Ill. 2006), aff'd Randle v. Neary (In re  
9 Randle), 2007 WL 2668727 (N.D. Ill. July 20, 2007). The statute simply  
10 requires the court "to consider only the amounts due under the contract  
11 itself." Id. See also Fokkena, 373 B.R. at 654 ("[T]here is no  
12 conditional language in § 707(b)(2)(A)(iii) that requires that a debtor  
13 must intend to continue to pay the contractually due amounts in order to  
14 claim the expense, and a debtor's intent to surrender her collateral does  
15 not alter her contractual obligation to make payments.")(citation  
16 omitted).

17         By conditioning the debtor's use of the deduction under  
18 § 707(b)(2)(A)(iii)(I) on whether he or she retains the collateral and  
19 actually makes payments on it, the minority is inserting language into  
20 the statute which is at variance with its plain meaning. See Simmons,  
21 357 B.R. at 485 ("To read into this provision some qualification based  
22 upon only a possible post-petition modification of secured debt that is  
23 otherwise contractually due on the petition date would go beyond the  
24 clear and plain meaning of the statute.").

25         I agree with the majority that under a plain reading of its  
26 language, § 707(b)(2)(A)(iii)(I) allows debtors, when calculating their



1 monthly disposable income under the means test, to deduct from their  
2 current monthly income the average payments on debts secured by  
3 collateral that they surrender. Reading the words in  
4 § 707(b)(2)(A)(iii)(I) as a whole, I find that the statute does not  
5 require debtors to retain the collateral and actually make payments on  
6 secured debts "as a prerequisite to allowing the deduction."<sup>18</sup>  
7 Benedetti, 372 B.R. at 95. If Congress had intended that debtors be  
8 precluded from deducting payment obligations secured by surrendered  
9 collateral in calculating their monthly income for means test purposes,  
10 they could have used expense deduction language specifying secured debt  
11 payments that debtors continue to make postpetition rather than secured  
12 obligations "scheduled as contractually due" on the petition date.

13 Accordingly, I find that the Stewarts appropriately may deduct  
14 their monthly mortgage expense under § 707(b)(2)(A)(iii)(I) in  
15 calculating their monthly disposable income. At the time they filed  
16 their chapter 7 petition, the Stewarts still were contractually liable to  
17 the creditor on the mortgage, even though they no longer occupied the  
18 residence. The filing of their bankruptcy petition and the surrender of  
19 their residence did not eliminate the Stewarts' contractual obligation to  
20 make their monthly mortgage payments to the creditor.

21 Deducting the mortgage payment from their current monthly  
22

---

23 <sup>18</sup> Some courts in the majority believe that the issue of whether  
24 "scheduled as" should be given its ordinary, common meaning or a  
25 bankruptcy-specific meaning is a distinction without a difference,  
26 because, under either interpretation, the scheduling of a secured debt  
does not change the fact that the payments on the secured debt are  
contractually due. See Lindstrom, 381 B.R. at 307; Hayes, 376 B.R. at  
62; Haar, 360 B.R. at 766.

1 income, as allowed under § 707(b)(2)(A)(iii)(I), I determine that the  
2 Stewarts have a negative disposable income. Accordingly, no presumption  
3 of abuse arises under § 707(b)(2)(A), and I deny the Motion to Dismiss  
4 under § 707(b)(2).

5  
6 B. Dismissal based on the totality of the circumstances under  
7 § 707(b)(3)(B)

8 Section 707(b)(3) provides, in relevant part:

9 In considering under paragraph (1) whether the granting of  
10 relief would be an abuse of the provisions of this chapter in a case in  
11 which the presumption in subparagraph (A)(i) of such paragraph does not  
12 arise or is rebutted, the court shall consider -

13 . . . (B) the totality of the circumstances . . . of the  
14 debtor's financial situation demonstrates abuse.

15 Section 707(b)(3)(B) does not provide any guidance as to the  
16 factors to consider in evaluating the totality of the debtor's financial  
17 circumstances. In re Talley, 389 B.R. 741, 743 (Bankr. W.D. Wash. 2008).  
18 Courts have recognized, however, that § 707(b)(3) is a "codification of  
19 pre-BAPCPA case law," thus they apply pre-BAPCPA case law when  
20 determining whether to dismiss a case for abuse. Id. (quoting In re  
21 Stewart, 383 B.R. 429, 432 (Bankr. N.D. Ohio 2008)(internal quotations  
22 omitted).

23 The Ninth Circuit considers six nonexclusive factors in  
24 evaluating the totality of the circumstances under § 707(b)(3):

- 25 (1) Whether the debtor has a likelihood of sufficient  
26 future income to fund a Chapter 11, 12 or 13 plan which  
would pay a substantial portion of the unsecured  
claims;  
(2) Whether the debtor's petition was filed as a  
consequence of illness, disability, unemployment, or  
some other calamity;

1 (3) Whether the schedules suggest the debtor obtained  
2 cash advancements and consumer goods on credit  
3 exceeding his or her ability to repay them;  
4 (4) Whether the debtor's proposed family budget is  
5 excessive or extravagant;  
6 (5) Whether the debtor's statement of income and  
7 expenses is misrepresentative of the debtor's financial  
8 condition; and  
9 (6) Whether the debtor has engaged in eve-of-bankruptcy  
10 purchases.

11 Price v. United States Trustee (In re Price), 353 F.3d 1135, 1139-40 (9th  
12 Cir. 2004).

13 Among the six Price factors, the Ninth Circuit has determined  
14 that the debtor's ability to pay his or her debts is of primary  
15 importance. Id. at 1140. Thus, "a debtor's ability to pay his debts  
16 will, standing alone, justify a section 707(b) dismissal." Id. (quoting  
17 Zolg v. Kelly (In re Kelly), 841 F.2d 908, 914 (9th Cir. 1988))(internal  
18 quotations omitted).

19 Although Price concerned interpretation of pre-BAPCPA § 707(b),  
20 the first factor retains its importance in a determination of abuse under  
21 current § 707(b)(3). See In re McUne, 358 B.R. 397, 399 (Bankr. D. Or.  
22 2006)(finding that fact that no presumption of abuse arises under  
23 § 707(b)(2) does not prevent court from considering a debtor's actual  
24 ability to pay his or her unsecured debts under a chapter 13 plan in  
25 determining whether dismissal is appropriate in the totality of the  
26 circumstances).

Hawkins advances arguments on the first and sixth Price  
factors. I address her arguments in reverse order.

With respect to the sixth Price factor, based on the Stewarts'  
testimony, I find Hawkins's argument unavailing. Hawkins alleges that

1 the Stewarts took a month-long "exotic vacation" and two trips between  
2 Oregon and the Virgin Islands, and purchased expensive new wardrobes, all  
3 immediately before their bankruptcy filing. At the final evidentiary  
4 hearing, Joshua Stewart testified that the Stewarts had spent less than  
5 \$1,000 on their entire trip to Thailand; they spent \$3 to \$5 a day for a  
6 "hut on a beach" and between 50 cents and \$1 per meal. Olga Stewart  
7 testified that she and Joshua vacationed in Thailand in April 2008, three  
8 months before they filed their chapter 7 petition. She also testified  
9 that it was not until June 2008, when the Stewarts began receiving calls  
10 from one of their creditors, that they contemplated filing for  
11 bankruptcy. As to the Stewarts' alleged purchase of new wardrobes,  
12 Hawkins provided no evidence, aside from her testimony, to establish that  
13 the Stewarts engaged in such purchases.

14 As to the first Price factor, Hawkins contends that the Stewarts  
15 should not include their monthly mortgage payment as a deduction in  
16 calculating their monthly disposable income. Instead, Hawkins claims,  
17 the Stewarts should be allowed \$1,800 for housing and utilities, as  
18 established under the Local Standards.

19 Eliminating the \$3,589 monthly mortgage payment, using the  
20 \$1,800 as the allowed IRS deduction for housing and utilities, and  
21 keeping remaining deductions the same, the Stewarts have monthly expense  
22 deductions totaling \$5,554.75. My calculations are as follows:

23  
24 Part V. Calculation of Deductions from income

25 Subpart A: Deductions under Standards for IRS  
26

19A	National Standards: food, clothing and other items	\$961
19B	National Standards: health care	\$114
20A	Local Standards: housing and utilities; non-mortgage expenses	\$505
20B	Local Standards: housing and utilities; mortgage/rent expense	\$1,800
22A	Local Standards: transportation; vehicle operation/public transportation expense	\$211
25	Other Necessary Expenses: taxes	\$1,558
33	TOTAL EXPENSES ALLOWED UNDER IRS STANDARDS	\$5,149

Subpart C: Deductions for Debt Payment

44	Payments on prepetition priority claims	\$10.75
45	Chapter 13 administrative expenses	\$395
46	TOTAL DEDUCTIONS FOR DEBT PAYMENT	\$405.75

Subpart D: Total Deductions from income

TOTAL OF ALL DEDUCTIONS ALLOWED UNDER § 707(B)(2).	\$5,554.75
--	------------

The Stewarts report a current monthly income of \$6,294. Subtracting \$5,554.75 from \$6,294, the Stewarts would have a monthly disposable income of \$739.25. Multiplied by 60, the Stewarts accordingly would have a 60-month disposable income of \$44,355.

Under the first Price factor, the Stewarts must have a

1 likelihood of sufficient future income to fund a plan that would pay a  
2 significant portion of their unsecured claims. 353 F.3d at 1139. Prior  
3 to BAPCPA, courts analyzed a hypothetical chapter 13 case to determine  
4 whether the debtor's financial situation demonstrated abuse. In re  
5 Parada, 391 B.R. 492, 501 (Bankr. S.D. Fla. 2008). However, the  
6 Stewarts' total unsecured debt exceeds the monetary limit for chapter 13  
7 eligibility.<sup>19</sup> The Stewarts further are not "family farmers" and thus are  
8 not eligible for relief under chapter 12. The Stewarts are eligible to  
9 be debtors under chapter 11, however. See § 109(d). See also Toibb v.  
10 Radloff, 501 U.S. 157, 160-61 (1991). I thus consider the first Price  
11 factor in my analysis of the totality of the circumstances within the  
12 context of chapter 11.

13           When the debtor is an individual in chapter 11, the plan must  
14 provide for payment of all or such portion of earnings from personal  
15 services performed by the debtor or other of the debtor's future income  
16 to creditors under the plan as is necessary for its execution. 11 U.S.C.

---

18  
19           <sup>19</sup> Under § 109(e), only an individual with regular income and such  
20 individual's spouse that owe, as of the petition date, noncontingent,  
21 liquidated, unsecured debts that aggregate less than \$336,900, may file a  
22 chapter 13 case. According to their schedules, the Stewarts have \$645 in  
23 unsecured priority debt, \$72,000 in the unsecured portion of the secured  
24 mortgage creditor's claim, and \$369,960 in unsecured nonpriority debt for  
25 total unsecured debt of \$442,605. See Scovis v. Henrichsen (In re  
26 Scovis), 249 F.3d 975, 982 (9th Cir. 2001)(stating that rule for  
determining chapter 13 eligibility under § 109(e) is that eligibility  
should be determined based on debtor's originally filed schedules, as  
long as schedules were filed in good faith). Hawkins's claim of \$19,168  
is the only unsecured claim characterized as contingent. Deducting her  
claim from the total unsecured debt, the Stewarts still have  
approximately \$423,437 in unsecured debt, thereby making them ineligible  
to file a chapter 13 case.

1 § 1123(a)(8).<sup>20</sup>

2 In order for the plan to be confirmed over an unsecured  
3 creditor's objection, an individual debtor in chapter 11 either must pay  
4 all unsecured claims in full or propose a plan that devotes an amount  
5 equal to five years' [60 months] worth of his or her projected disposable  
6 income to unsecured creditors. 11 U.S.C. § 1129(a)(15).<sup>21</sup> The Stewarts'  
7 unsecured claims total approximately \$423,437. Dividing their 60-month

8  
9 <sup>20</sup> Section 1123 provides, in relevant part:

10 (a) Notwithstanding any otherwise applicable  
11 nonbankruptcy law, a plan shall -

12 . . .

13 (8) in a case in which the debtor is an  
14 individual, provide for the payment to creditors  
15 under the plan of all or such portion of earnings  
16 from personal services performed by the debtor  
17 after the commencement of the case or other future  
18 income of the debtor as is necessary for the  
19 execution of the plan.

20 To be consistent with §§ 707 and 1322, § 1128(a)(8) was  
21 added to make it clear that an individual debtor in chapter 11  
22 must use his or her future income to fund payments to creditors  
23 under a chapter 11 plan. 7 Collier on Bankruptcy ¶ 1123.01[8]  
24 (15th ed. rev. 2009).

25 <sup>21</sup> Section 1129(a) provides, in relevant part:

26 (15) In a case in which the debtor is an individual and  
in which the holder of an allowed unsecured claim  
objects to the confirmation of the plan -

. . .

(B) the value of the property to be distributed  
under the plan is not less than the projected  
disposable income of the debtor (as defined in  
section 1325(b)(2)) to be received during the 5-  
year period beginning on the date that the first  
payment is due under the plan, or during the  
period for which the plan provides payments,  
whichever is longer.

1 disposable income of \$44,355, as calculated above, by \$423,437, the  
2 Stewarts would only pay approximately 10% on their unsecured claims over  
3 five years. If Hawkins's claim is added to the unsecured claims total,  
4 the potential distribution to the Stewarts' unsecured creditors under a  
5 chapter 11 plan would be less. And these calculations do not take into  
6 account the increased administrative expenses of a chapter 11 case (e.g.,  
7 converting the chapter 7 case to a chapter 11 case, confirming a plan,  
8 and potentially litigating the validity of Hawkins's contingent claim),  
9 which would reduce any potential distribution to unsecured creditor even  
10 further. See In re Maya, 374 B.R. 750, 755 (Bankr. S.D. Cal. 2007)  
11 ("Chapter 11 cases are more expensive, and the administrative costs would  
12 reduce the funds to be distributed to creditors."). Moreover, there is a  
13 risk that the Stewarts would not be able to perform their obligations  
14 over five years under a chapter 11 plan (e.g., if Olga Stewart lost her  
15 job).

16 Based on the record before me, Hawkins has not established that  
17 the Stewarts have sufficient excess income to fund a chapter 11 plan that  
18 would pay a substantial portion of their unsecured debt, i.e., more than  
19 pennies on the dollar, over the term of a five-year plan.

20 Given these circumstances, I do not find that the first Price  
21 factor has been satisfied and I conclude that in the totality of the  
22 circumstances, dismissal of the Stewarts chapter 7 case is not  
23 appropriate under § 707(b)(3).

#### 24 Conclusion

25 Based on the foregoing analysis and review of the record before  
26



1 me, I deny the Motion to Dismiss. The court will enter an order  
2 consistent with the conclusions reached in this Memorandum Opinion.

3 ###

4  
5 cc: Jeffrey Totten  
6 Emily T. Hawkins  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26